

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

JUSTIN J. EDMISTEN,

Plaintiff,

v.

JESSICA PERLICK, *et. al.*,

Defendants.

Case No. 3:22-CV-00441-ART-CLB

**REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE¹**

Before the Court is Plaintiff Justin Edmisten's ("Edmisten"), application to proceed *in forma pauperis* (ECF No. 1), and civil rights complaint, (ECF No. 1-1). For the reasons stated below, the Court recommends that Edmisten's *in forma pauperis* application, (ECF No. 1), be denied as moot, and his complaint (ECF No. 1-1), be dismissed without prejudice and without leave to amend.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to the LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the

¹ This Report and Recommendation is made to the Honorable Anne R. Traum, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 applicant's income, assets, expenses, and liabilities."

2 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with
3 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th
4 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely
5 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,
6 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Edmisten cannot pay the filing
8 fee, thus the Court recommends that Edmisten not be assessed the filing fee and the
9 motion be denied as moot. (ECF No. 1.)

10 **II. SCREENING STANDARD**

11 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
12 provides, in relevant part, that "the court shall dismiss the case at any time if the court
13 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a
14 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
15 who is immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when
16 "it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325
17 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims
18 against defendants who are immune from suit or claims of infringement of a legal interest
19 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
20 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
21 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
22 standard applied in the context of a motion to dismiss under Federal Rule of Civil
23 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which
24 requires dismissal where the complaint fails to "state a claim for relief that is plausible on
25 its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
27 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
28 accept as true all well-pled factual allegations, set aside legal conclusions, and verify

1 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.
 2 662, 679 (2009). The complaint need not contain detailed factual allegations, but must
 3 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a
 4 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is
 5 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies
 6 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).
 7 Still, a liberal construction may not be used to supply an essential element of the claim
 8 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is
 9 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice
 10 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*
 11 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

12 **III. SCREENING OF COMPLAINT**

13 In his complaint, Edmisten sues Defendants Attorney General Jessica Perlick
 14 (“Perlick”), Federal District Court Judge Richard Boulware (“Boulware”), Deputy District
 15 Attorney Sharron Clowers (“Clowers”), and Federal Public Defender Martin Narrvillo
 16 (“Narrvillo”) under 42 U.S.C. § 1983. (See ECF No. 1-1.) Edmisten’s complaint asserts
 17 claims which seem to relate to his underlying criminal case and conviction. (*Id.* at 2-6.)
 18 Edmisten requests unspecified declaratory judgment. (*Id.* at 7.)

19 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
 20 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
 21 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.
 22 2000)). The statute “provides a federal cause of action against any person who, acting
 23 under color of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526
 24 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive
 25 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,
 26 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation
 27 of a federally-protected right by (2) a person or official who acts under the color of state
 28 law. *Anderson*, 451 F.3d at 1067.

1 However, § 1983 is not a backdoor through which a federal court may overturn a
2 state court conviction or award relief related to the fact or duration of a sentence. Section
3 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts
4 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they
5 different in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.
6 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take
7 care to prevent prisoners from relying on § 1983 to subvert the differing procedural
8 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at
9 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner
10 challenges the legality or duration of his custody, raises a constitutional challenge which
11 could entitle him to an earlier release, or seeks damages for purported deficiencies in his
12 state court criminal case, which effected a conviction or lengthier sentence, his sole
13 federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);
14 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v.*
15 *Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where
16 “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction
17 or sentence,” then “the complaint must be dismissed unless the plaintiff can demonstrate
18 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

19 It appears that Edmisten is challenging the constitutionality of his state court
20 criminal conviction. Consequently, he must demonstrate that his conviction has been
21 overturned to proceed in an action under § 1983. As he has not done so, his sole relief is
22 a *habeas corpus* action. The Court, therefore, recommends that the complaint be
23 dismissed without prejudice and without leave to amend.

24 Additionally, the Court notes that Defendants Attorney General Perlick, Judge
25 Boulware, and Deputy District Attorney Clowners are likely absolutely immune from suit
26 under § 1983. See *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (“Judges
27 are absolutely immune from damage actions for judicial acts taken within the jurisdiction
28 of their courts.... A judge loses absolute immunity only when [the judge] acts in the clear

1 absence of all jurisdiction or performs an act that is not judicial in nature.”); *See Imbler v.*
2 *Pachtman*, 424 U.S. 409, 427, 430 (1976) (state prosecutors are absolutely immune from
3 § 1983 actions when performing functions “intimately associated with the judicial phase
4 of the criminal process.”).

5 **IV. CONCLUSION**

6 For good cause appearing and for the reasons stated above, the Court
7 recommends that Edmisten’s application to proceed *in forma pauperis*, (ECF No. 1), be
8 denied as moot, and his complaint, (ECF No. 1-1), be dismissed without prejudice and
9 without leave to amend.

10 The parties are advised:

11 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
12 Practice, the parties may file specific written objections to this Report and
13 Recommendation within fourteen days of receipt. These objections should be entitled
14 “Objections to Magistrate Judge’s Report and Recommendation” and should be
15 accompanied by points and authorities for consideration by the District Court.

16 2. This Report and Recommendation is not an appealable order and any
17 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
18 District Court’s judgment.

19 **V. RECOMMENDATION**

20 **IT IS THEREFORE RECOMMENDED** that Edmisten’s application to proceed *in*
21 *forma pauperis*, (ECF No. 1), be **DENIED AS MOOT**;

22 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint, (ECF No. 1-
23 1); and,

24 **IT IS FURTHER RECOMMENDED** that Edmisten’s complaint, (ECF No. 1-1), be
25 **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.**

26 **DATED:** November 29, 2022.

27 
28 **UNITED STATES MAGISTRATE JUDGE**